No. 05-35526
To be argued July 13, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CANADIAN CATTLEMEN'S ASSOCIATION and ALBERTA BEEF PRODUCERS,
Proposed Intervenors-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE *et al.*,
Defendants-Appellees,

and

RANCHERS CATTLEMEN ACTION LEGAL FUND
UNITED STOCKGROWERS OF AMERICA,
Plaintiff-Appellee.

Appeal From an Order of the United States District Court
for the District of Montana, No. CV-05-06-BLG-RFC

REPLY BRIEF FOR THE PROPOSED INTERVENORS-APPELLANTS

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INTRODUCTION

When a plaintiff sues to bar Canadian cattle and beef from the U.S. market and when the government agency solely defending the suit has repeatedly retreated from advocacy of an open border, then Canadian cattle producers are entitled to intervene to protect their interests. This is the essence of the instant appeal.

The Canadian Cattlemen's Association and Alberta Beef Producers (CCA/ABP) are foreign, private entities. They are not constituents of the United States Department of Agriculture (USDA), and USDA does not represent their interests. USDA's actions with respect to Canadian cattle and beef imports have often contradicted the interests of CCA/ABP, and USDA's pleadings in this case have fallen well short of making all of the arguments that CCA/ABP would make. Accordingly, CCA/ABP easily satisfy their "minimal" burden of showing that USDA does not adequately represent CCA/ABP's interests.

USDA and Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) mistakenly suggest that the determination of CCA/ABP's right to intervene can be reduced to the self-evident proposition that, if intervention were granted, USDA and CCA/ABP would be co-defendants in opposition to R-CALF's complaint against the Final Rule.[1] But the criteria for adequacy of representation are not so easily met. To determine whether USDA may not adequately represent

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[1] Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460 (Jan. 4, 2005) (Final Rule).

CCA/ABP, the range and priority of each party's interests must be examined. There, no congruence exists.

In a prior R-CALF lawsuit in 2004, USDA swiftly capitulated to R-CALF's demands for a preliminary injunction of USDA permits that would have authorized the importation of certain categories of Canadian beef products into the United States. The same permitting process is now challenged anew by R-CALF in the instant litigation. During the pendency of this action, and prior to the adjudication of R-CALF's complaint, USDA suddenly delayed indefinitely the implementation of a portion of the Final Rule that R-CALF had criticized, a provision allowing for the importation into the United States of beef products made from Canadian cattle over 30 months of age. These actions by USDA profoundly damaged CCA/ABP and underscore the divergence between CCA/ABP's interests and the interests advanced by USDA. These actions also demonstrate that, whatever is USDA's ultimate objective in this litigation, it is not the protection of CCA/ABP's interests in opening the border to Canadian cattle and beef products.

Notably, USDA does not contest that CCA/ABP have significant protectable interests at stake. R-CALF offers little resistance on this issue, arguing against CCA/ABP's protectable interest in their members' contracts without engaging the case law that explicitly establishes that contracts are a protectable interest. R-CALF also questions CCA/ABP's protectable interest in scientific safety standards

consistent with the international obligations of the United States. Yet it is a longstanding principle of U.S. law that domestic statutes, including the one that authorized the challenged Final Rule, should be construed so as to be consistent with U.S. international obligations.

Neither USDA nor R-CALF contests that disposition of this action may impair CCA/ABP's ability to protect their interests or that CCA/ABP's motion to intervene was timely, the other two criteria for establishing entitlement to intervention as of right.[2] The only argument raised by USDA or R-CALF against permissive intervention questions whether CCA/ABP have independent jurisdictional grounds for their intervention. Yet CCA/ABP have the same jurisdictional grounds to defend the Final Rule that R-CALF invokes in order to challenge it. USDA and R-CALF also note that CCA and ABP were recently permitted to file *amicus* briefs in the district court, but, as this Court has recognized, *amicus* status is no substitute for participation as intervenors.

Accordingly, the district court's denial of CCA/ABP's motion to intervene should be reversed, so that CCA/ABP can participate fully in a litigation that threatens the livelihoods of their members.

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[2] R-CALF states that CCA/ABP's motion to intervene failed to meet each of the four prongs of the Rule 24(a)(2) test for intervention, R-CALF Br. at 11, but addresses just two of those prongs.

ARGUMENT

I. CCA/ABP HAVE THE RIGHT TO INTERVENE.

A. USDA MAY NOT ADEQUATELY REPRESENT CCA/ABP.

USDA argues that it will adequately represent CCA/ABP because it shares CCA/ABP's desire to oppose R-CALF's suit and because, thus far, it has advocated that position. This USDA argument fails to address the Court's test for adequate representation and the factual record of USDA's inadequate representation.[3]

1. USDA's Governmental Interest And CCA/ABP's Private, Foreign Interests Diverge.

USDA rests its claim to represent CCA/ABP adequately on the fact that both USDA and CCA/ABP are opposed to the preliminary injunction issued by the district court and both wish the Final Rule to be upheld. USDA Br. at 6, 11. The alignment of USDA and CCA/ABP as common defendants in the event of intervention, however, fails to establish that, in the absence of intervention, USDA is a reliable proxy for CCA/ABP. Scrutiny must focus on the underlying interests of the parties to discover whether, prospectively, USDA's representation may be

[3] USDA mistakenly states that CCA/ABP's burden is "to show that USDA *does not* adequately represent their interests." USDA Br. at 21 (emphasis added). Rather, CCA/ABP's burden is to show that "the existing parties *may not* adequately represent the applicant's interest." *United States v. Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (emphasis added). CCA/ABP's burden is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (burden met "if the applicant shows that representation of [its] interest 'may be' inadequate").

inadequate. This inquiry begins by asking "whether the interest of a present party is such that it will *undoubtedly* make *all* of a proposed intervenor's arguments," and "whether the present party is capable and willing to make such arguments." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.), *cert. denied,* 540 U.S. 1017 (2003) (emphases added).

The Final Rule implicates a wide range of U.S. policy considerations involving U.S. cattle producers, U.S. feed lot owners, U.S. processors, and U.S. distributors of beef products, as well as international relations between the United States and its principal beef export markets, such as Japan and Korea. One or more of these interests that USDA serves may be at odds with those of CCA/ABP at any given stage of the instant lawsuit. Curiously, the centerpiece of USDA's discussion is a case that illustrates this point, *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). USDA Br. at 14-16. In that case, this Court found representation by the U.S. Forest Service inadequate where its interests were broader than the private interests of proposed intervenors. As the Court concluded, "[t]he government must present the broad public interest, not just the economic concerns of the timber industry. The Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County." *Forest Conservation Council*, 66 F.3d at 1499 (internal quotation marks, citations, and alteration omitted). In the instant case,

USDA similarly must respond to many U.S. policy considerations and has no obligation to champion CCA/ABP's particular interests.[4]

USDA appears to argue that because it is an agency of the United States government, intervention should be *harder* for foreign interests such as CCA/ABP. USDA states that CCA/ABP "must satisfy an even higher threshold before [they] can intervene in support of the government where, as here, the existing party is the government acting on behalf of a constituency that it represents" because "it will be presumed that [the government] adequately represents its citizens when the applicant shares the same interest." USDA Br. at 10 (internal quotation marks omitted); *see also id.* at 6 (CCA/ABP must meet increased burden where they "intend[ ] to support the government acting on behalf of its constituency").

Yet the premise that CCA/ABP "share[ ] the same interest" with USDA's domestic constituencies is wrong. CCA is the national federation of provincial organizations of *Canadian* cattle producers, of which ABP is the largest member organization. CCA/ABP Br. at 4. CCA, ABP, and the individual Canadian ranchers whom they represent are *not* constituents of USDA. National boundaries make a difference in a government's representation of private interests.

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[4] USDA questions CCA/ABP's citation to *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998), to support the point that CCA/ABP, as private organizations, have a more "narrow and parochial" interest than does USDA. But this Court recently cited that case for the very same proposition. *See Arakaki*, 324 F.3d at 1087-1088.

Fund for Animals, Inc. v. Norton, 322 F.3d 728 (D.C. Cir. 2003), specifically addresses the issue whether an agency of the United States government can adequately represent foreign interests. In *Fund for Animals,* an environmental group challenged the Interior Department's listing of central Asian argali sheep in Mongolia as a threatened species rather than an endangered species under the Endangered Species Act (ESA). The Mongolian government's ministry (NRD) moved to intervene in support of the U.S. Fish and Wildlife Service (FWS) in its defense of the listing. As the District of Columbia Circuit held:

> The NRD's interests plainly are not adequately represented by the federal defendants. It is true, as the [plaintiff] notes, that both the FWS and the NRD agree that the FWS's current rules and practices are lawful. But the FWS's obligation is to represent the interests of the American people, as expressed in the ESA, while the NRD's concern is for Mongolia's people and natural resources. . . . It is, therefore, not hard to imagine how the interests of the NRD and those of the FWS might diverge during the course of litigation -- when, for example, the FWS may be required to present its assessment of the quality of Mongolia's argali conservation program. . . . Hence, examined from the perspective of the FWS's responsibilities, the NRD's interests are more narrow and parochial -- just as the FWS's interests may appear when viewed from the perspective of Mongolia.

Id. at 736-37 (quotation marks and footnotes omitted).[5] The responsibility of USDA to represent the range of interests of the American people and the divergent responsibility of CCA/ABP to represent Canadian ranchers render it impossible to

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[5] Nothing in the *Fund for Animals* supports USDA's assertion that intervention by the NRD was permitted simply due to the NRD's status as an agency of a foreign sovereign.

conclude that USDA "undoubtedly" will make "all" the arguments that CCA/ABP would make.

2. USDA's Representation Of CCA/ABP's Interests Has Been Demonstrably Inadequate.

USDA seeks to diminish the inherent conflict between the interests of its domestic constituencies and the foreign, private interests of CCA/ABP by declaring that, as a matter of fact, it has adequately represented CCA/ABP. *See, e.g.,* USDA Br. at 11, 21. This claim is untenable. First, adequacy of representation, particularly early in litigation, is judged according to divergence of the underlying interests of the parties. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) (motion to intervene as of right filed six months after complaint). Therefore, it is not CCA/ABP's "burden at this stage in the litigation to anticipate specific differences in trial strategy. It is sufficient for [proposed intervenors] to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as [the proposed intervenors]." *Id.*

Second, USDA's past representation is relevant to show that CCA/ABP cannot count on USDA to represent their interests. The most glaring example of this inadequacy is found in USDA's sudden and unilateral capitulation in 2004 to R-CALF's demands to prohibit the importation of Canadian beef products from cattle over 30 months old and the arbitrary delay earlier this year of the Final Rule

provisions that would have permitted the importation of this same class of products. *See* CCA/ABP Br. at 5-7, 25-26.

In the first instance, during the rulemaking proceeding that produced the Final Rule challenged in this case, the USDA began to permit the importation of these products from Canada. R-CALF promptly filed suit in April 2004 to enjoin the issuance of permits for such imports. ER 1-14. Surprisingly, USDA did not aggressively oppose the challenge to its permitting process. A mere two weeks after the suit was filed, USDA stipulated to a preliminary injunction barring permits for Canadian beef products from over-30-month-old cattle, despite the damage to CCA/ABP's interests. ER 15-19. The preliminary injunction remained in force until the Final Rule was issued. ER 16.[6]

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[6] The additional record excerpts that R-CALF provides on USDA's defense in the predecessor litigation hardly bolsters confidence in the adequacy of USDA's representation. *See* R-CALF SER 23 (district court noting that when R-CALF moved for a temporary restraining order on April 22, 2004, "the U.S. Attorney's Office . . . informed the Court that no one was available to participate at that time"); *id.* (district court noting that in issuing April 26, 2004 order it was relying only on R-CALF's complaint, memorandum, and declarations and exhibits, and no pleadings by USDA); *id.* at 5 (district court remarking that on "May 5, [2004], in essence, the USDA and the plaintiffs stipulated to the imposition of a preliminary injunction that would stay in effect during this rule-making process.").

CCA/ABP do not consider themselves adequately represented by an agency that, in defense of its permitting process for Canadian beef, offered argument telephonically at the district court's April 23, 2004 chambers hearing without filing any substantive pleadings, only to stipulate, two weeks later, to R-CALF's request for a preliminary injunction. The award of attorney fees cited by R-CALF, R-CALF Br. at 6, testifies more to USDA's failure to defend its permitting process than to its effective representation of CCA/ABP interests.

The Final Rule was issued on January 4, 2005. Five days later this litigation commenced. 70 Fed. Reg. 460; ER 20-54. Among other things, the Final Rule would have reopened the U.S. border to imports of beef from Canadian cattle over 30 months of age. Only a few weeks later, however, during the pendency of this case and before any adjudication of R-CALF's complaint, USDA abruptly backtracked again by indefinitely delaying the provisions of the Final Rule allowing these imports. 70 Fed. Reg. 12,112, 12,113 (Mar. 11, 2005) (formalizing delay that had been announced on Feb. 9, 2005). For the second time, USDA acted to the detriment of CCA/ABP's interests as producers of Canadian cattle.

USDA misconstrues the significance of this pattern of inadequate representation. USDA Br. at 18-19. CCA/ABP do not wish to intervene on the issue of beef products from over-30-months-old cattle; those imports are no longer part of this case thanks to USDA's decision to delay implementation. Rather, USDA's sudden abandonment first of its own permitting policies and then of parts of its Final Rule provides incontrovertible evidence that USDA has not adequately represented CCA/ABP's interests both before and during the pendency of this case. Direct evidence of the clash between USDA's and CCA/ABP's interests surrounding the reopening of the U.S. border to Canadian cattle and beef products is highly relevant to determining whether USDA may not adequately represent CCA/ABP in this case. *See Los Angeles*, 288 F.3d at 402 (inadequate

representation found where "the record of this case and the *past dealings of the parties* indicate a marked divergence of positions") (emphasis added).[7] These recent events demonstrate that USDA serves interests other than those of CCA/ABP and that, when these interests conflict, those of CCA/ABP do not prevail.[8]

USDA's record in this litigation provides additional cause to doubt the adequacy of its representation of CCA/ABP's interests. Most recently, in opposition to R-CALF's motion for summary judgment, USDA failed to raise arguments that CCA and ABP presented extensively in their respective *amicus* briefs. CCA's brief (1) discussed the Final Rule's consistency with guidelines published by the World Animal Health Organization (OIE) and demonstrated how recent revisions to the OIE guidelines further validate the Final Rule; (2) distinguished the BSE experience in the European Union (including the United Kingdom) and Japan from that in North America; and (3) debunked R-CALF's economic analysis of the impact of the Final Rule on consumer demand and U.S.

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[7] *Arakaki*, 324 F.3d at 1083, cited extensively in USDA Br. at 18-19, is not to the contrary, stating only that a party cannot intervene regarding claims that have been dismissed.

[8] Accordingly, USDA's comment that it "is already on record in this litigation as a firm defender of the BSE mitigation measures undertaken by Canada and Canadian cattle producers," USDA Br. at 13 n.5, is undermined by its decision to delay implementation of portions of the Final Rule. USDA's actions speak louder than its words.

export markets. CCA/ABP SER 8-31. ABP devoted its *amicus* brief to legal arguments in opposition to R-CALF's attempt to use its challenge of the Final Rule to bar imports not only of Canadian cattle but also of Canadian beef products. CCA/ABP SER 32-51.

USDA's opposition to R-CALF's motion for summary judgment did not address many of these issues and addressed others only in passing. For example, USDA's brief did not address R-CALF's comparison of Canada's BSE mitigation efforts with those of Japan, nor did USDA address R-CALF's economic expert's most recent misinterpretations of the projected impact of future BSE cases on the consumer market, or his mischaracterizations of U.S. export markets. USDA mentioned the recent OIE revisions only in a brief footnote without analysis. CCA/ABP SER 7 n. 22. USDA touched on only one of several legal arguments presented in ABP's *amicus* brief, and did so in no more than two paragraphs. CCA/ABP SER 27-28.

The relative inattention by USDA to R-CALF's challenge to the permitting process for imports of beef products is truly remarkable. Such a challenge, if successful, would increase immensely the harm done to the Canadian cattle industry and, if combined with a permanent injunction against the Final Rule, would effectively close the United States market to the products of CCA/ABP's members. That USDA devoted relatively little of its briefing on summary

judgment to an issue so crucial to CCA/ABP is yet another confirmation of the inadequacy of USDA's representation.

R-CALF joins with USDA in insisting that CCA/ABP have nothing to contribute to these proceedings, *see* R-CALF Br. at 19. To the contrary, CCA/ABP have much to contribute. CCA/ABP can provide factual information critical to future aspects of this case. *See* CCA/ABP Br. 27-28.[9] Moreover, CCA/ABP can provide a more effective defense against some of R-CALF's claims. Indeed, R-CALF expressly asked the district court for permission to augment its brief on summary judgment so that it could address issues raised by CCA and ABP in their respective *amicus* briefs. CCA/ABP SER 52-53. Evidently, CCA/ABP had something to contribute after all, something that USDA did not adequately convey in its arguments for summary judgment.[10]

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[9] USDA argues that "[b]ecause the underlying litigation was brought under the Administrative Procedure Act, judicial review of USDA's decision should be limited to the record before the agency," USDA Br. at 12, but fails to mention the established exceptions to that rule provided in the same case it cites. *See Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (stating exceptions). The irony of USDA and R-CALF, *see* R-CALF Br. at 19, asserting that the district court must decide this case on the Administrative Record should not be lost on this Court: both USDA and R-CALF have submitted hundreds of pages of non-record materials in support of their respective motions for summary judgment, as well as in their pleadings on the preliminary injunction.

[10] R-CALF assails CCA/ABP's proposed Answer as offering "no new defenses . . . [or] arguments," R-CALF Br. at 9, and adding "nothing to USDA's answer." *Id.* at 19. But the reverse is true. CCA/ABP filed its proposed Answer *before* USDA filed its Answer. *Compare* R-CALF SER 8-19 (CCA/ABP's proposed

3. USDA And CCA/ABP Do Not Share The Same "Ultimate Objective."

USDA argues that it shares with CCA/ABP the "same ultimate and identical interest in the case," USDA Br. at 17-18, and that a shared "ultimate objective" yields a strong "presumption" of adequate representation. *Id.* at 6, 9. USDA's ultimate objective, however, is far from clear. While USDA professes to share CCA/ABP's ultimate objective of an integrated North American cattle and beef market governed by scientifically sound regulations, its actions frequently belie this objective. As noted above, a few months before the Final Rule was issued and only days after being sued, USDA stipulated to a preliminary injunction of its permitting process for beef from Canadian cattle over 30 months of age. Then, after the Final Rule was announced, USDA delayed indefinitely the implementation of a significant portion of the Final Rule, thereby again blocking importation of Canadian beef products derived from over-30-months-old cattle. Even broader challenges to the USDA permitting process brought in this case have met only a limited response from USDA, potentially jeopardizing CCA/ABP's vital interests.

USDA criticizes CCA/ABP for engaging in speculation as to what interests USDA may have, USDA Br. at 20-21. Yet the record of USDA's inadequate

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Answer dated Mar. 18, 2005) *with* ER 72-89 (USDA's Answer dated Apr. 11, 2005).

representation leaves CCA/ABP rightly uncertain about what the future may bring if intervention is foreclosed. As examples, CCA/ABP are concerned that, at a future time, USDA will seek to settle this suit with R-CALF and, in so doing, abandon or modify the existing permitting process for the importation of Canadian beef, or otherwise alter the application of the Final Rule. Moreover, even if USDA were to litigate the remaining case on its merits but lose, CCA/ABP have no assurances that USDA would fully protect their interests during any negotiations regarding remedies. If importation of beef products from Canada were permanently enjoined by the district court, CCA/ABP cannot assume that USDA would adequately represent their interests on appeal. Furthermore, in the event that a stay of such an injunction were sought, only CCA/ABP would be able to offer complete and credible information about the injunction's injury to their interests. In sum, USDA's penchant for abruptly and unilaterally abandoning portions of its regulatory scheme that provide access to the U.S. market for CCA/ABP products offers no assurance that USDA would vigorously represent CCA/ABP's interests going forward.

Uncertainty as to USDA's ultimate objective eliminates any presumption of adequate representation that might attach from a common desire of CCA/ABP and USDA to oppose this suit. *See Southwest Ctr.*, 268 F.3d at 823 (questioning "whether the presumption of adequacy applies at all here because complexity

makes the determination of an 'ultimate objective'" difficult). Even if this presumption were to apply, it is rebutted where the parties "do not have sufficiently congruent interests." *Id.* Thus, in discussing the adequacy of representation, this Court explained that, in the context of the federal Fish and Wildlife Service, *id.* at 823-824,

> a federal agency, and other defendants also cannot be expected under the circumstances presented to protect these private interests. . . . The priorities of the defending government agencies are not simply to confirm the Applicants' interests in the [mandated plans and permits]. The interests of government and the private sector may diverge. . . . It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants. Resolution of this case will decidedly affect Applicants' legally protectable interests and "there is sufficient doubt about the adequacy of representation to warrant intervention." *Trbovich,* 404 U.S. at 538.

By contrast, in *Arakaki,* 324 F.3d at 1087, this Court concluded that State defendants would adequately represent a native Hawaiian group that sought to intervene to defend the constitutionality of the provision of certain benefits exclusively to members of Hawaiian groups. To find that the proposed intervenors shared the same "ultimate objective" with the State defendants, the Court observed that the State defendants were directed by the State constitution and statute to provide benefits to native Hawaiians. *Id.* The Court also noted that others representing Hawaiian natives had already successfully intervened in the case. The Court concluded,

> The presence of [an organization of native Hawaiians] as a similarly situated intervenor, combined with the State defendants' specific statutory and constitutional obligations to protect native Hawaiians' interests, distinguishes this case from those in which we have permitted intervention on the government's side in recognition that the intervenors' interests are narrower than that of the government and therefore may not be adequately represented.

Id. at 1087-1088. Here, no other organizations representing Canadian cattle producers have intervened, and USDA has no constitutional or statutory obligations to protect CCA/ABP's interests. Indeed, the record is plain that USDA does not feel compelled to represent CCA/ABP's interests; USDA's "ultimate objective" apparently lies elsewhere. [11]

B. CCA/ABP HAVE SIGNIFICANT PROTECTABLE INTERESTS IN THE SUBJECT MATTER OF THIS ACTION.

USDA does not contest on appeal that CCA/ABP have significant protectable interests in the subject matter of this action. R-CALF, however, belatedly takes issue with CCA/ABP's significant protectable interests.[12]

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[11] Both USDA and R-CALF argue that intervention by CCA/ABP would result in a flood of others seeking intervention rights. *See, e.g.* R-CALF Br. at 13; USDA Br. at 7. The only applications for intervention currently before the courts are those of CCA/ABP and the National Meat Association. Members of the Canadian Parliament were denied intervention by the district court and have not appealed. New applicants for intervention would face a timeliness problem. *See* Fed. R. Civ. P. 24(a) (requiring that application for intervention as of right be timely); *Los Angeles*, 288 F.3d at 397 (same).

[12] In the district court, R-CALF did "not a take a position" on whether CCA/ABP had demonstrated a significant protectable interest. R-CALF Dist. Ct. Resp. at 2.

R-CALF expresses doubt that CCA/ABP are being harmed at all by the ban on imports of cattle and many beef products. R-CALF Br. at 7-8, 12. The optimism expressed in the articles R-CALF cites is contingent upon the U.S. border remaining open to Canadian beef as the Final Rule proposes. But R-CALF seeks to nullify the Final Rule and to stop presently permitted U.S. imports of Canadian beef. Moreover, even the articles cited by R-CALF recognize the substantial injury sustained by the Canadian industry.[13] The Canadian cattle and beef industries suffered great losses as a result of the border closure to Canadian cattle and the unavailability of U.S. slaughter facilities to process Canadian beef products.

The relief sought by R-CALF would eliminate Canada's largest export market for cattle and beef products and negate the benefits of the restructuring that has taken place in the Canadian industry since the border closure.[14] If the district

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[13] *See* Darcy Henton, *Mad Cow Crisis Made Alberta Beef Industry Stronger, Says Agriculture Minister*, Canadian Press, June 24, 2005 ("Canada's industry has been devastated by the impact of the crisis, losing an estimated $7 billion, but with emergency government programs to keep beef producers afloat, the industry has survived."); Judith Kohler, *Canadian Cattle Industry Warns Beef Ban May Boomerang on U.S.*, Associated Press, May 24, 2005, *available at* http://www.agweekly.com/articles/2005/05/25/commodities/cattle/cattle02.txt. ("The border closure has cost Canadian ranchers $5.7 billion.").

[14] In 2004, 74 percent of Canadian cattle and beef exports went to the United States. *See* Beef Information Centre, *Canada's Beef Industry Fast Facts*, June 2005, *available at* www.cattle.ca/producer/2005_06_Fast_Facts_english.pdf. The U.S. border closure has prompted an extensive restructuring of the Canadian industry. *See* Agriculture and Agri-Food Canada News Release, *Government*

court were to erect a more prolonged or more extensive barrier to the U.S. market, the survival of many CCA/ABP members would be placed in jeopardy. The suggestion that CCA/ABP members are not being gravely injured by the current ban on imports is spurious.[15]

In sum, the preliminary injunction ordered by the district court has already done grave damage to the members of CCA/ABP. If a permanent injunction were granted, or if relief were extended to bar imports not only of cattle but also of beef products, then the interests of CCA/ABP would be devastated. In addition to the basic economic interest of CCA/ABP in the outcome of this case, there are three specific protectable interests that are threatened by R-CALF's lawsuit. Each of these is reviewed in turn.

Announces Strategy to Reposition Canada's Livestock Industry, Sept. 10, 2004, *available at* http://www.agr.gc.ca/cb/index_e.php?s1=n&s2=2004&page=n40910a (detailing federal investment of up to Cdn $488 million).

[15] The district court's preliminary injunction hearing, cited by R-CALF, R-CALF Br. at 7, in support of the claim that CCA/ABP are not being injured, actually provides further proof that USDA does not adequately represent CCA/ABP. Had CCA/ABP been parties to the proceeding, the court's remark that it "didn't realize that the impact on the Canadian beef market was so negligible," and its question, "what's the rush to get this final rule to implementation?", R-CALF SER 6, would not have gone unanswered. USDA made no effort to address the district court's misperceptions of the condition of the Canadian industry. Instead, USDA responded that "there isn't a rush." *See* CCA/ABP SER 3. CCA/ABP could not disagree more with USDA's position.

1. CCA/ABP Have A Significant Protectable Contractual Interest.

CCA/ABP have a significant protectable interest in their members' contracts for the sale of cattle, which have been disrupted, impeded, and precluded by the district court's action to date. R-CALF characterizes CCA/ABP's contracts as undifferentiated economic interests, R-CALF Br. at 12-13, simply ignoring cases holding that contract interests are protectable interests justifying intervention as of right. *See* CCA/ABP Br. at 17-18. The only case cited by R-CALF holds that the prospective collectability of a debt of the defendant to the proposed intervenor was not a protectable interest under Rule 24(a)(2). *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) (intervention as of right denied to protect against "an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded"). By contrast, in the instant case CCA/ABP uniquely represent the interests of Canadian cattle producers, and there are no other proposed or potential intervenors that can duplicate that representation. R-CALF argues that CCA/ABP's contracts are not "address[ed]" by the Final Rule it challenges, R-CALF Br. at 14, but the interests of intervenors need not be "before the court" so long as "they are protected by law" and are related to "the interests at issue" in the case. *Sierra Club v. US EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).

R-CALF also questions the relevance of contracts that had to be cancelled and future contracts that might not be executed as a result of the current action. R-CALF Br. at 13. As this case is currently postured, the district court's preliminary injunction has already granted a substantial portion of the relief R-CALF seeks, forcing the cancellation of CCA/ABP contracts made in reliance on the Final Rule. R-CALF cannot, on the one hand, extinguish CCA/ABP members' contractual interests by means of an injunction and, on the other hand, complain that no contractual rights remain to qualify CCA/ABP for intervention.

The future ability to contract, upon which the welfare of an industry depends, is a significant protectable interest.[16] The fishing industry was allowed to intervene as of right in a challenge to Commerce Department regulations regarding over-fishing where:

> [t]he circumstances are such that if the [plaintiff] prevails . . . the fishing groups' economic interests will be substantially affected. . . . Here, the adverse effect is certain. The fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the proposed intervenors' business, both immediately and in the future.

Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 43 (1st Cir. 1992). Similarly, here the R-CALF-proposed change in the rules under

[16] R-CALF mistakenly asserts that CCA/ABP's interest in future contracts is "novel." R-CALF Br. at 13. Yet the same issue was raised in the district court. CCA/ABP Mem. Supp. Mot. Intervene at 8 (explaining that preliminary injunction "has called into question the reliability of [CCA/ABP] members to perform under any future contractual supply arrangements").

which Canadian cattle or beef products are imported into the United States would certainly have an adverse effect on CCA/ABP members' ability to contract and, thereby, on their ability to conduct their business.

2. CCA/ABP Have A Significant Protectable Interest In Internationally Mandated, Scientifically Based Safety Standards.

CCA/ABP have a significant protectable interest in a North American cattle and beef market that is regulated by safety standards that are consistent with international norms and are not simply disguised trade barriers. This interest is legally protected both by the Animal Health Protection Act (AHPA), the statute under which the Final Rule was promulgated, and by the international trade obligations of the United States. *See* 7 U.S.C. § 8301(5)(B)(i) (AHPA necessary "to prevent and eliminate burdens on interstate and foreign commerce"); North American Free Trade Agreement (NAFTA), Article 712(5), 712(3), Dec. 17, 1992, 32 I.L.M. 289 (1993) (safety measures must be "based on scientific principles" and "risk assessment"); Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Article 2.2, Apr. 15, 1994, 1867 UNTS 493 (safety measures must be applied "only to the extent necessary to protect human, animal, or plant life or health" and "not [be] maintained without sufficient scientific evidence").

R-CALF attacks this significant protectable interest by mischaracterizing it. R-CALF asserts that NAFTA and the SPS Agreement do not "modify" domestic law and that neither international agreement provides a private right of action. R-CALF Br. at 14-15. Although the congressional adoption of NAFTA and the SPS Agreement did in fact entail amendments to U.S. laws, *see* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3301 *et seq.*); Uruguay Round Agreements Act , Pub. L. 103-465, Section 101(d)(3), 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3501 *et seq.*), the more basic point being ignored by R-CALF is that there is a longstanding principle of U.S. law that domestic laws should be construed so as to be consistent with the international legal obligations of the United States to the extent possible. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing U.S. labor law so as not to violate customary international rules of maritime jurisdiction). CCA/ABP have a significant interest in the adjudication of the Final Rule that takes into account the U.S. obligations under both NAFTA and the SPS Agreement.

That neither of these international agreements creates a private right of action does not diminish the protectable interest of CCA/ABP. Intervenors need not be able to bring a distinct cause of action to secure their protectable rights. *See Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("As

[Rule 24]'s plain text indicates, intervenors of right need only an 'interest' in the litigation – not a 'cause of action' or 'permission to sue.'"). CCA/ABP's protectable interest must simply be "protected by law," *Alisal*, 370 F.3d at 919, and related "to the underlying subject matter of the litigation," *id.* at 920. CCA/ABP's interest in scientifically-based safety standards for cattle and beef are protected by U.S. international legal obligations, which in turn have been approved by Congress and are to be considered in the interpretation of U.S. law. This interest thus fully satisfies the criteria for a significant protectable interest under Rule 24.

3. CCA/ABP Have A Significant Protectable Reputational Interest.

CCA/ABP have a significant protectable interest in the reputation of Canadian cattle and beef upon which their industry depends. R-CALF questions CCA/ABP's interest in the marketability of cattle and beef products of Canadian cattle producers that would be harmed by a judicial declaration that Canadian beef is unsafe. R-CALF Br. at 15. Yet R-CALF claimed a similar reputational interest in U.S. beef before the district court, which recognized it in granting the preliminary injunction. The district court found that "[o]nce the Canadian beef is allowed to intermingle with U.S. meats it will open a flood of speculation" about the quality of U.S. products, resulting in a "stigma [attached] to all U.S. meat," which would irreparably injure R-CALF. *Ranchers Cattlemen Action Legal Fund*

United Stockgrowers of Am. v. USDA, 359 F. Supp. 2d 1058, 1073-1074 (D. Mont. 2005).

If the district court were to render a final decision declaring that Canadian cattle and beef present a "potentially catastrophic risk of danger to the beef consumers in the U.S," *id.* at 1066, the reputational stigma affecting CCA/ABP's interests in the marketability of their members' products would be substantial. CCA/ABP have a significant protectable interest in preventing the damage to property from this stigma. *Cf. Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977) (intervention as of right for individuals to assure property values not adversely affected by opening of abortion clinic in their neighborhood).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CCA/ABP PERMISSIVE INTERVENTION.

CCA/ABP easily satisfy the requirements for permissive intervention, and the district court's denial of their motion for permissive intervention was an abuse of discretion. First, the timeliness of CCA/ABP's motion to intervene is uncontested.

Second, CCA/ABP satisfy the permissive intervention prerequisite of "independent grounds for jurisdiction," *Los Angeles*, 288 F.3d at 403 (quotation marks omitted). CCA/ABP rely upon the same jurisdictional grounds on which this suit was brought, namely, federal question jurisdiction arising from the

challenge to, or defense of, the Final Rule. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) (permissive intervention to "assert 'defenses' of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action"). The sole case cited by R-CALF in challenging the independent jurisdictional grounds of CCA/ABP, R-CALF Br. at 21, is inapposite on its facts. *See Blake v. Pallan*, 554 F.2d 947, 955-956 (9th Cir. 1977) (rejecting claim of independent jurisdiction based solely on pendent state-law claims).

Third, the "defenses" CCA/ABP intend to assert with respect to the Final Rule are plainly spelled out in CCA/ABP's proposed Answer and its brief in support of its motion to intervene, and they surely have questions of law and fact in common with the main action, thereby satisfying the third and final requirement for permissive intervention. *Cf. Kootenai Tribe*, 313 F.3d at 1110 n.9 (permissive intervenors' pleadings described interest in challenged rule and lands protected by it). Contrary to R-CALF's demands, R-CALF Br. at 21, there is no need for CCA/ABP to state any other claims in their proposed Answer. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (liberally construing Fed. R. Civ. P. 24(c), "[c]ourts, including this one, have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion").

Finally, R-CALF argues that intervention will prolong or unduly delay this litigation, R-CALF Br. at 21, but the argument is simply unsupportable. From the outset, CCA/ABP expressed their commitment to comply with the briefing and hearing schedule set by the district court, so that no delay would occur. *See* CCA/ABP Motion to Intervene at 2. That commitment stands today: CCA/ABP have the most compelling interest in the swift resolution of this litigation.

III. THE DISTRICT COURT'S GRANT OF LEAVE FOR CCA AND ABP TO FILE *AMICUS* BRIEFS DOES NOT REMEDY THE DENIAL OF THEIR MOTION TO INTERVENE.

USDA and R-CALF mistakenly assert that CCA/ABP's appearance as *amici curiae* provides adequate representation of CCA/ABP's interests. *See* USDA Br. at 22, 24; R-CALF Br. at 16. *Amicus* status is no substitute for intervenor status. *See Forest Conservation Council*, 66 F.3 at 1498 ("We reject appellees' claim that *amicus curiae* status is sufficient for appellants to protect their interests . . . ."); *United States v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984) (recognizing the "obvious distinctions between parties and *amici*"). An *amicus curiae* is not a party to the litigation, *see Miller-Wohl Co. v. Comm'n of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982), and cannot file pleadings or otherwise participate and assume an active adversarial role in litigation, *see United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Intervenors, but not *amici,* may appeal from an adverse judgment that other parties refrain from appealing. *See, e.g., Idaho Farm Bureau*

Fed'n v. Babbitt, 58 F.3d 1392, 1397-1399 (9th Cir. 1995) (intervenors successfully vacate district court judgment on appeal after federal agency declined to pursue appeal from adverse judgment overturning final rule listing endangered species). Intervenors can participate in negotiations between the parties on the same basis as other participants. *See Oregon*, 745 F.2d at 553. On appeal, issues raised only by an *amicus* are generally not considered by this Court, *see Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993), and intervenors enjoy far greater participation in appellate proceedings than do *amici*. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205 (1965) (summarizing rights of intervenor in a reviewing court); Fed. R. App. P. 29 (restricting length of briefs, right to submit reply briefs, and oral argument for *amici*). For all of these reasons, the district court's grant of leave to file the CCA and ABP *amicus* briefs does not remedy the court's denial of CCA/ABP's motion to intervene.

CONCLUSION

The district court's order denying CCA/ABP's motion to intervene should be reversed and remanded with instructions to grant CCA/ABP's motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AND NINTH CIRCUIT RULE 32–1

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

1. This reply brief of Proposed Intervenors-Appellants Canadian Cattlemen's Association and Alberta Beef Producers complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply brief of Proposed Intervenors-Appellants Canadian Cattlemen's Association and Alberta Beef Producers complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.

DATED: July 7, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of July, 2005, I filed the original and copies of the foregoing brief and Supplementary Excerpts of Record with the Clerk of the Court by third-party commercial carrier for delivery within 3 calendar days, and I served two copies of the foregoing brief and Supplementary Excerpts of Record by third-party commercial carrier for delivery within 3 calendar days and electronic mail on the parties herein, at the following addresses:

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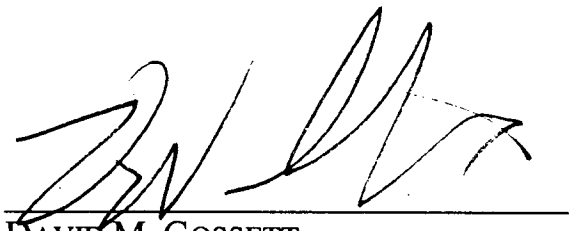

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